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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. KEVIN ANTHONY PUGLIZEVICH, Defendant and Appellant.	F061368 & F062703 (Merced Super. Ct. Nos. CRM004417, MF50213B, AF45662 & MF46148) **O P I N I O N**

THE COURT*

APPEAL from a judgment of the Superior Court of Merced County. Carol Ash, Judge.

Rudy Kraft, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and Tiffany J. Gates, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Gomes, J., and Detjen, J.

Appellant Kevin Anthony Puglizevich appeals from the judgment entered on his no contest pleas to various counts in four cases and the order awarding presentence custody credits and imposing restitution fines. He contends the trial court erred by calculating his presentence custody credits as of September 28, 2010, the date the court imposed his 12 year 8 month sentence, rather than as of April 5, 2011, the date the court calculated his custody credits and imposed restitution fines. He also contends there are three math errors in the calculations. The People agree with the second claim, but disagree with the first. In a supplemental brief, appellant argues that if he was sentenced in September 2010, the court lacked jurisdiction to increase his punishment by imposing restitution fines in April 2011. The People respond that assuming the trial court lacked jurisdiction to impose restitution fines when it did, appellant is estopped from asserting this claim because he consented to the trial court's action. We will modify the abstract of judgment and affirm.

FACTS AND PROCEDURAL HISTORY

This appeal involves four cases: (1) CRM004417, a September 2010 no contest plea to eight burglary counts with a someone in residence enhancement on each; (2) AF45662, a March 2007 no contest plea to possession of methamphetamine and tear gas; (3) MF46148, a July 2007 no contest plea to two counts of grand theft and one count of receiving stolen property; and (4) MF50213B, a March 2009 no contest plea to one count of receiving stolen property. In case number CRM004417, pursuant to appellant's admissions, the court found he had violated his probation in the three earlier cases.

On September 28, 2010, appellant entered his plea in case number CRM004417 and asked to be sentenced and remanded to the Department of Corrections "forthwith." The trial court imposed the stipulated disposition of 12 years 8 months in prison, and additional concurrent terms for the probation violations. The court told appellant his conduct credits and restitution fines would be determined at a hearing on November 19,

2010. Appellant waived his presence for that hearing and the court remanded him to be transported to the Department of Corrections.

The next day, the trial court issued an abstract of judgment that reflected appellant's sentences in the four cases, but did not contain a custody credit determination or restitution fines. On November 8, 2010, appellant filed notices of appeal (F061368) challenging that judgment.

The credit and restitution determination hearing that had been set for November was eventually held on April 5, 2011. The trial court issued an amended abstract of judgment on April 6, 2011. The abstract includes the same prison term imposed in September, as well as the presentence custody and conduct credits and restitution fines. On June 10, 2011, appellant filed a second notice of appeal, F062703, seeking to appeal from these orders.

This court advised appellant it was considering dismissing appeal number F062703 as untimely. Appellate counsel in case number F061368 responded by filing a motion to consolidate the appeals. In ruling on the motion, this court stated the trial court did not issue a final judgment in the underlying case until April 6, 2011, when it calculated appellant's custody credits. Accordingly, the notices of appeal filed in case number F061368 were premature and not operative until April 6, 2011. The court granted the motion to consolidate case numbers F061368 and F062703.

Subsequently, in response to appellate counsel's motion, the trial court amended the presentence custody credit.

DISCUSSION

Presentence Credits

The trial court awarded presentence custody credits based on reports from the Merced Probation Department indicating actual days of custody that both parties accept

as correct. The court calculated appellant's presentence custody credits on April 5, 2011, as follows:

Case Number	Actual Credits	Conduct Credits	Total
CRM004417	387	58	445 days
MF46148	704	216	920 days
MF50213B	387	192	579 days
AF45662	387	192	579 days

The court issued an amended Abstract of Judgment, which included the presentence custody credits, on April 6, 2011.

In December 2011, the court amended appellant's custody credits as follows:

Case Number	Actual Credits	Conduct Credits	Total
CRM004417 [no change]	387	58	445 days
MF46148	809	120	929 days
MF50213B	479	122	601 days
AF45662	825	122	947 days

Appellant contends the trial court erred in calculating his custody credits by (1) failing to award credits through April 6, 2011, when it issued the final judgment in the case and (2) making three math errors in the calculations. The People agree there are math errors, but disagree that credits should have been awarded through April 6, 2011.

Math Errors

The parties agree that under Penal Code section 2933.1[1], appellant was able to earn only 15 percent conduct credits in all four cases. (See *In re Reeves* (2005) 35 Cal.4th 765, 780.) They also agree the conduct credits awarded in case number MF46148 should be 121 rather than 120 days (.15 x 809 = 121.35) and the conduct

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1 Further statutory references are to the Penal Code.

credits awarded in case number AF45662 should be 123 rather than 122 days (.15 x 825 = 123.75). They further agree there is a math error in the conduct credit calculation in case number MF50213B. Rather than 122, appellant asserts the correct number of days is 76; the People assert the correct number is 71 days. The People are correct (.15 x 479 = 71.85). We will order the abstract of judgment be amended accordingly.

Date for Calculating Credits

Appellant asserts the trial court erred by calculating his presentence custody credits as of September 28, 2010, the date the court pronounced sentence, rather than as of April 5, 2011, the date the court calculated his custody credits and imposed restitution fines. He bases his argument in part on the August 2011 order from this court, which stated "the trial court did not issue a final judgment in the underlying case until April 6, 2011." From that, appellant argues he was sentenced on April 6, 2011, rather than September 28, 2010, and should be awarded credits accordingly. In the alternative, he asserts, "something must be done about the abstract of judgment to insure that the Department of Corrections understands that they must calculate appellant's credits after September 28, 2010." The People submit that appellant was sentenced on September 28, 2010, and there is no reason to doubt that the Department of Corrections will fulfill its duty under section 2900.5, subdivision (e) to calculate appellant's credits beginning from the date of sentencing. We find no error.

In a criminal case, judgment is rendered when sentence is orally imposed. (*People v. Thomas* (1959) 52 Cal.2d 521, 530, fn 3.) The trial court pronounced judgment, imposed sentence and remanded appellant to be transported to the Department of Corrections on September 28, 2010. Further, the amended abstract of judgment states under item #14 CREDIT FOR TIME SERVED: "Date Sentence Pronounced: 09-28-

10." Thus, the trial court properly calculated custody and conduct credits based on that date.

We have no reason to doubt that appellant was transported to the Department of Corrections "forthwith"—well before the April 5, 2011, hearing. Pursuant to Section 2900.5, subdivision (e), the California Department of Corrections and Rehabilitation (CDCR) determines and awards credits earned in local custody, if any, after sentencing and before delivery to state prison. (See *People v. Brown* (2012) 54 Cal. 4th 314, 321, fn. 8.) And, pursuant to section 2900, subdivision (c), "… all time served in an institution designated by the Director of Corrections shall be credited as service of the term of imprisonment." Nothing in the record supports appellant's concern that he will not receive the custody credits that he is due under the applicable statutes. As such, there is no need to amend the abstract of judgment in this regard.

Additional Sentencing Error

The People contend the trial court deviated from the previously imposed, but suspended, sentence pronounced on March 12, 2009. The suspended sentence of four years four months was a final judgment. As such, when the court revoked appellant's probation in case numbers AF45662, MF46148 and MF50213B, it was without jurisdiction to change the final judgment and was obligated to execute the earlier judgment after revocation of probation. (*People v. Colado* (1995) 32 Cal.App.4th 260, 262.) The People ask the court to modify appellant's sentence to reflect the previously imposed, but suspended, sentence in case numbers AF45662, MF46148 and MF50213B. Appellant does not address this contention in his reply brief, but defense counsel made the same assertion at sentencing. We will order the abstract of judgment corrected accordingly.

Restitution Fine Orders

In a supplemental brief, appellant argues that if he was sentenced in September 2010, the court lacked jurisdiction to increase his punishment by imposing restitution fines in April 2011. The People respond that assuming the trial court lacked jurisdiction to impose restitution fines when it did, appellant is estopped from asserting this claim because he consented to the trial court's action. The People have the better argument.

The trial court loses the power to modify a valid sentence to increase appellant's punishment after he begins serving his sentence. (*People v. Thomas, supra*, 52 Cal.2d at p. 531.) But, in this case, it is clear from the record that appellant wanted to be remanded to prison promptly and not only agreed to, but expressly requested, the later imposition of restitution fines.

> "THE COURT: … I'm going to set this out to a date to receive your credit report, and also a fine determination. And there will be further terms and conditions. You're ordered to pay a restitution fund fine, then there would be an additional fine that would be stayed, pending your successful completion of parole. [¶] … [¶] [Defense Counsel] has indicated you're willing to waive your presence and just have him represent you for that.
>
> "THE DEFENDANT: Yes, Your Honor.
>
> "THE COURT: Okay. We'll note that you are waiving your presence.
>
> So you are remanded to be transported to the Department of Corrections."

At the conclusion, defense counsel said: "I want to make sure that each minute order makes it clear that the defendant waives his presence at the next hearing, and the order of the Court is that he be transported forthwith." The court replied, "We'll put that on each minute order."

Here, the trial court ordered appellant to pay a restitution fund fine at sentencing but left the amount to be determined. Appellant agreed to this procedure. When the

court has subject matter jurisdiction, as this court did, a party who seeks or consents to an act beyond the court's power may be estopped to assert that the act was in excess of jurisdiction. Whether estoppel applies depends on the importance of the irregularity to the parties, to the functioning of the courts and to considerations of public policy. A litigant who has stipulated to a procedure in excess of jurisdiction may be estopped to question it when to hold otherwise would permit the party to trifle with the courts. On the other hand, waiver of procedural requirements is not permitted when the deviation would lead to confusion in the processing of other cases. (*In re Griffin* (1967) 67 Cal.2d 343, 347-348.)

In this case, no policy, substantive or procedural, precludes estoppel of appellant to attack the excess of jurisdiction that resulted from his request to be remanded to prison immediately, before the court had the necessary information to calculate custody credits and impose restitution. Under the circumstances, appellant is estopped from contesting the court's jurisdiction to act because, to hold otherwise, would permit appellant to trifle with the court.

DISPOSITION

The judgment is modified as follows: (1) appellant is awarded 121 days of conduct credit and total presentence custody credits of 930 days in case number MF46148; (2) appellant is awarded 123 days of conduct credit and total presentence custody credits of 948 days in case number AF45662; and (3) appellant is awarded 71 days of conduct credit and total presentence custody credits of 550 days in case number MF50213B. In addition, the abstract should be corrected to reflect the previously imposed, but suspended, sentences in case numbers AF45662 (eight months), MF46148 (eight months) and MF50213B (three years). The trial court is directed to prepare an amended abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation.

As modified, the judgment is affirmed.